IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of case

Criminal Jail Appeal No.579/2001
(Old No. 188/1991)

Date of decision: 16.9.2004

For the approval of:

Hon'ble Mr. Justice Irshad Hussain

Hon'ble Mr. Justice J. C. S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting? Yes

- Whether the reporter be allowed to see the judgment? Yes

Dated 16.9.2004

LSR

IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL

CRIMINAL APPEAL NO.579 OF 2001-new no.
CRIMINAL APPEAL NO.188/1991old no.

Ram Bahadur son of Lal Bahadur,
R/o Khera Kanda Lagga, village
Kandoye, Tahsil Chakrata, District
Dehradun.

---------- Appellant.

Versus

State of Uttaranchal---------- Opposite Party.

Mr. S.K.Mishra learned Amicus Curiae for the appellant
Mr. A.Rab learned A.G.A. for the State.

HON'BLE IRSHAD HUSSAIN, J
HON'BLE J.C.S.RAWAT J.

1. This is a criminal Appeal preferred by appellant Ram Bahadur against the judgment and order dated 18.01.1991 passed by the Sessions Judge, Dehradun in S.T. No.16/1990 by which he convicted the appellant u/s 302 I.P.C. and sentenced him for life imprisonment.

2. The facts, in brief, are that Smt. Dhillo deceased was married to the appellant. The appellant used to ill-treat her and threatened her to kill. Due to danger of her life from the appellant, the deceased was not ready to go to her in-laws. On 3.10.1989 at about 8 p.m. Sher Bahadur (P.W.1) uncle, Tankiya (P.W.2) brother, Smt. Amrita (P.W.3) mother and Mani Ram (P.W.5) father of the deceased Smt. Dhillo and she herself were taking meals. The appellant armed with a gun came there and from the door of the room opened fire on his wife Smt. Dhillo. The fire arm shot hit in the region of the face of Smt. Dhillo and due to injury she died

spontaneously. The appellant was chased but he got successful in escaping.

3. Sher Bahadur (PW1) uncle of deceased and real borther of Mani Ram (PW4) lodged written report (Ex.Ka-1) at Patwari patti Barontha, Tehsil Chakrata, district Dehradun on 5.10.1989 at 5.30 p.m. On the basis of written report (Ex.Ka-1) chick report (Ex.Ka-4) was prepared and a case u/s 302 IPC was registered. The investigation of case was taken by patwari of the area Chanchal Singh (P.W.7). He visited the place of occurrence and prepared site plan (Ex. Ka 5), Panchayatnama (Ex. Ka 2), Sketch of the body (Ex. Ka 6), sample of seal (Ex. Ka 7) and Challan Lash (Ex. Ka 9). The Investigating Officer took in possession blood stained earth and simple earth from the place of occurrence and prepared recovery memo Ex.Ka 10.

4. The dead body was sealed and sent for post mortem through Jeevan Singh, Peon (PW8). The autopsy on the body of the deceased was conducted by Dr. A.P.Mamgain (PW6), Medical Officer, Doon Hospital, Dehradun on 8.10.1989 at 2 p.m. and the doctor prepared post mortem Ex. Ka 3. The following ante mortem injuries were found on the body of the deceased:-

1. Gun shot wound on left side of cheek, 1cm in diameter, 3cm lateral to left angle of mouth, margins inverted, blackening present.

2. Gunshot wound 1 cm in diameter 2cm above and lateral to injury no.1. Margin inverted, blackening present.

3. Gunshot injury 1cm in diameter on front and left side of neck middle-margins inverted. Wound of exit present 1.25 cm in diameter on left side of back of neck.

4. Gunshot injury on left side of shoulder margins inverted. Wound of exit present on the back of the shoulder.

5. Lacerated wound 2 cm x 1cm x muscle deep on the left shoulder, 4cm medial to the top of shoulder.

From injury no.1 one pellet was recovered just below the base of the skull. In injury No. 2 pellets were present in the medial coronial cavity. In the opinion of the doctor the death was caused due to shock and haemorrhages and as a result of ante mortem injuries.

5. The appellant was arrested on 12.10.1989 and on his personal search nothing incriminating was recovered from him and the Investigating Officer prepared memo of search (Ex. Ka 8).

6. After completing the investigation, Charge sheet Ex. Ka 11, was submitted by the Investigating Officer against the appellant.

7. Charge U/s 302 I.P.C was levelled against the appellant for committing the murder of Smt. Dhillo. The appellant pleaded not guilty and claimed to be tried.

8. The prosecution in support of its case examined PW1 Darshan Singh, who is the complainant and uncle of the deceased. He proved written report Ex. Ka 1. PW2 Tankiya, brother, PW3 Smt. Amrita, mother, PW4 Mani Ram father of the deceased and P.W.5Sabbal Singh are the witnesses of fact. PW6 Dr. A.P. Mamgain

conducted the post mortem on the dead body of the deceased and proved post mortem report Ex. Ka 3. PW7 Chanchal Singh, Patwari investigation the case and proved Panchayatnama (Ex. Ka 2), F.I.R. (Ex. Ka 4) site plan (Ex.Ka5)), Photo Lash (Ex. Ka 6) sample of seal (Ex.Ka7) memo of search (Ex. Ka 8) of the appellant, Challan Lash (Ex. Ka 9), recovery Memo of blood stained earth and plain earth from the place of occurrence, Ex. Ka 10 and Charge sheet Ex. Ka 11. PW8 Jeevan Singh Peon brought the dead body in sealed condition to the mortuary.

9. The appellant in his statement U/s 313 Cr.P.C. admitted that the deceased was his wife and that she was living at the house of her father. He stated that he went to Goraghati from Chakrata on 03.10.1989 at 5.30 p.m. with Mohar Singh, Kunwar Singh, Myaram , Kesar Singh, Seena Singh Patwari and Mona peon. On information received he participated in the funeral ceremony of his wife. He has been falsely implicated in the case. The appellant has not adduced any evidence in defence.

10. On consideration of the entire evidence on record the learned trial court convicted and sentenced the appellant as above.

11. Heard the learned counsel for the parties and perused the record carefully.

12. It is not disputed that the death of Smt. Dhillo was a homicidal. It is also not disputed that the deceased was the wife of the appellant. It is further not disputed that Smt. Dhillo wife of the appellant was living at the house of her father. Dr. A.P.Mamgain, PW6 who

conducted the post mortem on the dead body of Smt. Dhillo and prepared post mortem report Ex. Ka 3 has opined that the death was caused due to shock and haemorrhage resulting from ante mortem injuries.

13. The prosecution produced 4 eye witnesses namely, Sher Bahadur (PW1), uncle of the deceased, Tankiya (PW2), brother of the deceased, Smt. Amrita mother of the deceased and Mani Ram PW4, father of the deceased. They were sitting inside the room along with the deceased. Smt. Dhillo and were taking their meal in the room. The house of Mani Ram were the witnesses were taking meals with Smt. Dhillo comprises of only one room. All the 4 eye witnesses of the incident have stated in their evidence that the appellant armed with a gun came at the door of the house of Mani Ram where the deceased and the witnesses were taking their meal. The appellant opened fire on his wife Smt. Dhillo from the door of the room. According to the above eyewitnesses the fire hit in the region of the face of Smt. Dhillo and due to the injury she died spontaneously. The appellant was chased but he got successful in escaping from the scene of occurrence. Thus the evidence of above four eye witnesses of the incident who were present in the same room in which the murder of Smt. Dhillo was committed is credible and cogent. The defence made a lengthy cross-examination with all three witnesses but nothing beneficial to the defence could be elicited from their testimony and they remained unshaken during the cross-examination. The presence of the witnesses in the room was not only probable but it was also natural.

It was submitted that Sher Bahadur, PW1, who was the real uncle of the deceased was a chance witness because he lives separately in the same village and there was no occasion for Sher Bahadur, PW1, to be present there at the time of the incident. The learned A.G.A. refuted the contention. It is natural that Sher Bahadur, PW1, was the real brother of Mani Ram and he was taking meal in the house. It was the time to take the meal. PW1 Sher Bahadur being the elder brother of Mani Ram had come there to share the meal. His presence at the time of incident is probable and natural. The submission of learned counsel for the defence is insignificant.

14. The prosecution also adduced the evidence of Sabbal Singh, PW5, who had his house in the same village and he reached at the scene of occurrence on hearing the noise of firearm shot. According to him when he reached at the place of occurrence he saw Smt. Dhillo lying dead inside the room of Mani Ram. He had stated that the appellant fired on Smt. Dhillo and she died spontaneously. He reached at the spot immediately after the incident and he was told by the witnesses that Smt. Dhillo was murdered by the appellant. Thus, the evidence of PW5 Sabbal Singh as part of *res gestae* *is also relevant.* The witness was cross-examination at length by the defence but he remained unshaken during the cross-examination. His evidence is cogent and credible.

15. The learned counsel for the defence submitted that the incident took place on 3.8.1989 at about 8 p.m. the dark hours of the night and since there was no

light outside the room the witnesses had no occasion to recognize the assailant. It was further submitted that the assailant fired the shot from the door of the room where also there was no light. As such there was no occasion to recognize the assailant. The learned A.G.A. questioned the merit of the contention. The eye witnesses knew the appellant, as he was the husband of the deceased. The appellant was well known to the witnesses. The room in which the incident took place was a small room and the burning wood scraps were lightening the room. As such the light produced by the wood fire was sufficient enough to recognize the appellant standing on the door. Apart from this the parties were living in the village atmosphere and they are used to live in the village without light. In such a situation the witnesses could have easily identified the assailant by his voice, as he was a very well known person and close relative. As such the contention of the defence is not tenable.

16. It was further contended on behalf of the defence that the witnesses have claimed in their evidence that they had recognized the appellant in the light produced by the wood fire but such source of light has not been indicated in the F.I.R. It was further contended that the witnesses have also claimed that Tankiya, PW2, had a torch with him and he chased the appellant in the light of the torch. The defence further contended that this fact has not been mentioned in the F.I.R. and in the statement U/S 161 Cr.P.C. The contention is not of much significance because it is not expected from the informant to mention the minor details in the F.I.R.

when the deceased the real niece was hit by the gunshot who died spontaneously and that too at the hands of the husband. Due to mental disposition such as horror and terror at the time of incident and lodging of F.I.R. such minor details are not expected from the informant. The light produced by the wood fire was sufficient to recognize the appellant standing on the door. It is also credible and cogent evidence of the prosecution that Tankiya, PW2, had a torch with him and no sooner the appellant opened fire he was chased flashing the light of the torch. On assessment of this also there could have been no difficulty to recognize the assailant at the place of occurrence.

17. The learned counsel for the defence also contended that the eyewitnesses PW1 to PW4 were sitting inside the room and their faces were towards the fire place and they were taking their meal. The fireplace (oven) was situated just opposite to the door of the room from where the appellant fired gunshot on the deceased. As such the eye witnesses could not have seen the appellant to fire the gunshot on the deceased and as such the testimony of the eyewitnesses is liable to be rejected. The learned A.G.A. refuted the contention. All the four witnesses have stated in their evidence that they had seen the appellant standing at the door from where he fired at the deceased. The distance between the door and the place from where the deceased was taking meal was hardly 25 or 30 paces. As soon as a person comes at the door it would be natural conduct of the witnesses that they would see who was coming there. As such the

evidence of the witnesses inspires confidence that they had seen the incident. The witnesses were not embedded towards the oven. They would naturally move towards the door as and when they would feel that somebody was coming from that door. Sometime a witness may not stand the test of cross-examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skillful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to imbalance and, therefore, minor discrepancies have to be ignored. The learned counsel for the defence further pointed out certain variations in the evidence of the witnesses. We have gone through the testimony of all the eyewitnesses of the incident. No importance can be given to such minor variations. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. Some discrepancy is bound to be there in each and every case, which should not weigh with the court so long it does not affect the prosecution case. In case the discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim

“let hundred guilty persons be acquitted, but not a single innocent be convicted” is, in practice, changing the world over and courts have been compelled to accept that “society suffers by wrong convictions and it equally suffers by wrong acquittals.” – see **Krishna Mochi Vs. State of Bihar 2002 SCC (Cri) p/1220.**

18. The oral testimony of the witnesses stands further corroborated by the medical evidence. The post mortem report reveals that the injuries on the person of the deceased Smt. Dhillo were located in the region of the left side of the face and neck of the deceased. Dr. A.P. Mumgain PW6 has categorically stated that the injuries could possibly the result of one fire-arm shot. The post mortem report further reveals that firearm shots were made from a very close range. Thus various wounds on the different region of the left side of the face and neck were caused obviously due to the disbursal of pellets. The prosecution has established by evidence that the appellant opened one fire from single barrel gun. As such the dispursal of pellets has caused the gun shot injuries by a single fire. The opinion of the doctor and the evidence of the prosecution witnesses is thus consistent that the death of Smt. Dhillo was committed by a single gun shot fire.

19. The Incident took place on 3.10.1989 at about 8 p.m. at village Khat Bislad, Tehsil Chakrat, district Dehradun and the first information report was lodged on 5.10.19089 at 5 p.m. with Patti Patwari Chanchal Singh PW7 at his head quarter. The evidence of the prosecution and FIR clearly reveal that the distance in between the place of occurrence and the Patti Patwari

is about 25 kilometers. The incident took place in the night and it was also to be kept in mind that the place of incident falls in the hill area and in the hill area means of transport and communication are not fast and swift as in the plain area. In the hill area mostly one has to cover the difficult terrain on foot. It is also difficult to cover the distance in the night. As there is no regular police station in the hill area where the report could be lodged with promptitude. Some time the Patwari remains out of his house and the person visiting his head quarter had to remain there for a long time. It is difficult to cover the distance in the night hours in the hill area. The distance in between the place of incident and the Patwari head quarter is about 25 kilometers. Sher Bahadur, PW1, had covered this distance on foot. The report was lodged on 5.10.89 and the Patwari on the next day visited the spot. In these circumstances, there is no ordinate delay in lodging the FIR. The FIR thus also corroborates the ocular testimony of the prosecution witnesses.

20. It is admitted case of the prosecution that the deceased was the wife of the appellant and she was living at the house of her father. The prosecution has also adduced evidence that the deceased was not treated well by the appellant. The appellant used to commit various restraints on the deceased. The appellant was in the habit of taking liquor and there after he used to physically assault the deceased. In consequences thereof Smt. Dhillo left her in-laws house and came to her parental house. The appellant tried to take her back to his house but she did not accede to his

request. When Smt. Dhillo refused to go to her in-laws house then the appellant took the extreme steps of committing her murder. The prosecution has further established the motive of committing the murder of Smt. Dhillo. This fact further corroborates the ocular testimony of the prosecution witnesses.

21. The learned counsel for the defence contended that the prosecution witnesses have clearly admitted in their cross-examinations that the appellant took part in the cremation of the deceased on 8.10.1989 at Dehradun. It was further contended that if the appellant would have committed the murder of the deceased he could have joined the cremation and should have absconded from his house. The conduct of the appellant clearly reveals that he did not commit the murder of his wife. The contention was refuted by the learned A.G.A. The learned Session Judge has rightly observed in his judgment that after having committed the murder of his wife the appellant was under constrant tension. It was further submitted that the Patwari could have arrested the appellant on 8.10.1989 but he was not arrested by the Patwari even though same Patwari was there and the appellant was arrested on 12.10.1989. This contention of the defence is not tenable because the ocular testimony of the witnesses clearly reveal that the murder of Smt. Dhillo was committed by the appellant. Merely not arresting the appellant from the place of cremation does not make any dent in the prosecution story. It is not clear in the evidence that Patwari who was investigating the case was present at the time cremation. It is only in the

evidence that Patwari and peon were present at time of cremation of Smt. Dhillo. If the Patwari had not arrested him at that time it is only remissness on the part of the Investigating Agency.

22. It was further submitted that the investigation of the case was not made properly and the appellant is entitled to get the benefit of the said defective investigation. It was submitted that the distance in the site plan has not been shown by the Investigation Officer and the Investigating Officer has not seized the torch by which the appellant was recognized. It was further submitted that the Investigating Officer has not indicated the place where the oven was situated in the room. The above omissions are only the remissness on the part of the Investigating Officer. Even if the investigation is defective, the pales into insignificance when ocular testimony is found credible and cogent. In the case of defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer. See-

1- Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004(3 SCC p/6540.

2. **Chotu Vs. State of Maharashtra 1997 CRI L.J. 4394 (SC).**

3. **Karnel Singh Vs. State of M.P., 1995 CRL. L. J. 4173.**

23. The appellant has taken a plea of *alibi* in his statement 313 Cr.P.C. that he had gone from Chakrata to Goraghati on 3.10.89 and reached there at 5.30 p.m. and from there he went to his village Bandakhera. It has come in the evidence of Chanchal Singh PW7 Investigating Officer that the distance between Khera Rewsana and Bandakhera is 20 kilometers, which can be covered on foot in 6 hours. It is also in the prosecution evidence that there is another shorter route to reach the place of incident to Bandakhera, which could be covered in 2 hours. The appellant in support of the plea of alibi has adduced no evidence. The Learned Sessions Judge had rightly rejected the plea of alibi.

24. In view of the above discussion we find that the learned Sessions Judge has rightly found the appellant guilty for the offence of committing the murder of Smt. Dhillo and he has also rightly convicted and sentenced the appellant. This court requires no interference. We are, therefore, convinced that the appeal has no merit. The appeal is dismissed.

25. Let the copy of this judgment alongwith the record of the case be sent to the trial court for needful compliance under intimation to this court within two months positively.

(J.C.S.Rawat J) (Irshad Hussain J)

September 16, 2004